

BEFORE THE  
POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

IN THE MATTER OF  
RON STALLINGS,

Appellant,

v.

SOUTHWEST AIR POLLUTION  
CONTROL AUTHORITY,

Respondent.

PCHB No. 85-16

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER

This matter, the appeal of a notice of violation and civil penalty of \$25 for open burning of natural vegetation in violation of section 400-035 of Regulation I, came on for formal hearing before the Pollution Control Hearings Board, Lawrence J. Faulk (presiding) and Gayle Rothrock, April 4, 1985, at Vancouver. The formal hearing was electronically recorded. Wick Dufford, Lawyer Member, has reviewed the record and electronic recording of the hearing.

Appellant Mr. Stallings appeared and represented himself. Respondent Southwest Air Pollution Authority (SWAPCA) appeared by its

1 attorney David Jahn.

2 Witnesses were sworn and testified. Exhibits were examined. From  
3 the testimony heard and exhibits examined, the Board makes these

4 FINDINGS OF FACT

5 I

6 Respondent, pursuant to RCW 43.21B.260, has filed with this Board  
7 a certified copy of its revised Regulation I, adopted April 17, 1984,  
8 the contents of which are noticed.

9 II

10 On December 27, 1984, in the afternoon, appellant allegedly  
11 allowed or caused an outdoor fire of natural vegetation at 6806 Hazel  
12 Dell Avenue, Vancouver, Washington.

13 III

14 There was one small fire pile consisting of natural vegetation.  
15 The inspector from respondent agency was on routine patrol and noticed  
16 blue smoke coming from appellant's backyard. He proceeded to the  
17 scene of the fire.

18 IV

19 Respondent SWAPCA's inspector arrived at the fire site at 2:52  
20 p.m., observed natural vegetation burning and discussed the codes and  
21 practices of open burnig with appellant. This included a discussion  
22 of the dates of the fall burn season policy adopted by SWAPCA, a  
23 season which started October 1, and ended December 15, 1984. The  
24 appellant was issued and signed a field notice of violation for  
25 "burning out of season." The section of Regulation I of SWAPCA which

26 FINAL FINDINGS OF FACT,  
27 CONCLUSIONS OF LAW & ORDER  
PCHB No. 85-16

1 he allegedly violated was not listed on this field notice.

2 V

3 On December 27, 1984, appellant was issued a regular notice of  
4 violation and a letter from the Executive Director of respondent  
5 agency levying a \$25 fine for violation of section 400-040 of  
6 Regulation I which he received December 29, 1984. From this appellant  
7 appealed to this Board on January 22, 1985.

8 VI

9 Respondent publicizes the burn season by notifying the news media  
10 immediately before the season begins and just prior to its close.  
11 Written permission is not required for open burning of natural  
12 vegetation during the burn season. Outside of the burn season, no  
13 open burning may be conducted without a permit and permits are only  
14 issued in the most extraordinary circumstances.

15 VII

16 Appellant did not have a permit. He did not think he needed one  
17 to burn natural vegetation because he was under the impression that  
18 the burn season had not yet ended. He indicated that he saw other  
19 open fires that same day. The fire was attended and thus was under  
20 control. The fire was put out when the inspector requested that it be  
21 extinguished. He indicated that he called SWAPCA on October 1, 1984  
22 and he thought they said the burn season extended to January 15, 1985.

23 VIII

24 Respondent listed section 400-040 (Emissions) of Regulation I as  
25 opposed to 400-035 (Open Fires) of Regulation I. Respondent advanced

26 FINAL FINDINGS OF FACT,  
27 CONCLUSIONS OF LAW & ORDER  
PCHB No. 85-16

1 the open fire violation at the hearing. There is, however, no  
2 evidence that appellant was, in fact, confused or misled as to the  
3 nature of the violation for which the penalty was assessed.

4 IX

5 Appellant has received no prior violations of SWAPCA Regulation I.

6 X

7 Any Conclusion of Law which should be deemed a Finding of Fact is  
8 hereby adopted as such.

9 From these Findings the Board comes to these

10 CONCLUSIONS OF LAW

11 I

12 The Legislature of the state of Washington has enacted the  
13 following policy on outdoor fires:

14 It is the policy of the state to achieve and  
15 maintain high levels of air quality and to this end  
16 to minimize to the greatest extent reasonably  
17 possible the burning of outdoor fires. Consistent  
18 with this policy, the legislature declares that  
such fires should be allowed only on a limited  
basis under strict regulation and close control.  
RCW 70.94.740).

19 Pursuant to this and other legislative authority, the respondent has  
20 adopted its Regulation I, Section 400-035, which provides in relevant  
21 part:

22 No person shall ignite, cause to be ignited, permit  
23 to be ignited, or suffer, allow, or maintain any  
24 open fire within the jurisdiction of the Authority,  
25 except as provided in this Regulation ... (2) Open  
26 burning may be done under permit: (b) No permit  
shall be issued unless the Control Officer is  
satisfied that: (i) No practical alternate method  
is available for the disposal of the material to be

27 FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW & ORDER  
PCHB No. 85-16

1 burned. (The Authority has a written Open Outdoor  
2 Fire Policy describing times, areas and kinds [of]  
3 permitted open fires) . . . .

4 II

5 The Washington Clean Air Act, at RCW 70.94.431, requires a notice  
6 of civil penalty to describe the violation with "reasonable  
7 particularity."

8 The notice is similar to the effect of a summons in a civil  
9 action. When appealed to this Board, it also has the effect of a  
10 civil complaint. See Yakima County Clean Air Authority v. Glascam  
11 Builders, Inc., 85 Wn.2d 255, 260 (1975). The Pollution Control  
12 Hearings Board has adopted comprehensive rules of procedure governing  
13 not only the conduct of its hearings, but also adopting the pre-trial  
14 procedures of the superior courts. WAC 371-08-031. All of the  
15 various pre-trial motions and discovery proceedings are, thus, made  
16 available to parties before this Board.

17 Under CR 15(b), when issues not raised by the pleadings are tried  
18 by express or implied consent, they are treated as if they had been  
19 raised in the pleadings. In the instant case, we adopt this  
20 approach. We are aware that application of such a principle could  
21 unfairly prejudice a pro se appellant who did not understand the  
22 nature of the charges against him, and did not request a continuance  
23 when he belatedly did learn the true nature of the complaint. Here,  
24 however, we do not have such a situation. We, therefore, conclude  
25 that respondents amended their pleading at the time of hearing without  
26 prejudice to appellant. In these circumstances, the requirement of

27 FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW & ORDER  
PCHB No. 85-16

1 RCW 70.94.431 to describe the alleged violation with "reasonable  
2 particularity" was met.

3 III

4 Respondent agency established that Section 400-035 of the SWAPCA  
5 regulation was, in fact, violated. The burn season is a time during  
6 which general permission to engage in outdoor burning of natural  
7 vegetation is granted by the authority. However, the fire in question  
8 occurred after the close of the declared burn season. Appellant did  
9 not contest either that an outdoor fire had been conducted or that he  
10 had no permit to conduct it.

11 IV

12 Ignorance of open burning regulations is no defense to a citation  
13 of their violation. J.J. Welcome & Sons v. PSAPCA, PCHB No. 42,  
14 (1971).

15 V

16 RCW 70.94.431 provides for the imposition of a civil penalty  
17 against "any person who violates any of the provisions of chapter  
18 70.94 RCW or any of the rules and regulations of the department or the  
19 board." The violation of SWAPCA, Regulation I, Section 400-035, falls  
20 within this language, and, therefore, assessment of a penalty in this  
21 instance was lawful.

22 VI

23 SWAPCA publicized the period during which limited burning could be  
24 conducted. In consideration of SWAPCA's purpose to secure compliance  
25 generally, the amount of the penalty assessed is not unreasonable.

26 FINAL FINDINGS OF FACT,  
27 CONCLUSIONS OF LAW & ORDER  
PCHB No. 85-16

VII

Under the facts, the instant penalty should be upheld. However, the Board points out again that SWAPCA's open burning regulations are not a model of clarity. The agency would assist the public and help to avoid appeals like this one if its Regulation I were revised to explain the relationship of the burn season to the permit program. Moreover, in the highly regulated context of present-day life, the public interest would be better served if efforts to inform citizens of restrictions were more than perfunctory in matters so basic to the management of households as open burning.

VIII

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions the Board enters this

ORDER

The notice of violation and \$25 civil penalty is affirmed.

DONE THIS 3rd day of May, 1985.

POLLUTION CONTROL HEARINGS BOARD

See Dissenting Opinion  
LAWRENCE J. FAULK, Chairman

Gayle Rothrock  
GAYLE ROTHROCK, Vice Chairman

Wick Dufford  
WICK DUFFORD, Lawyer Member

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW & ORDER  
PCHB No. 85-16



1 DISSENTING OPINION - LAWRENCE J. FAULK

2 I write separately because the majority opinion does not require  
3 the Southwest Air Pollution Control Authority (SWAPCA) to publish its  
4 burn season regulations in a way that is clear to the citizens.

5 This case involved open burning of natural vegetation.

6 It surely is not the Board's responsibility to tell a local air  
7 pollution control agency how to perform its duties. But it has been  
8 apparent for a long time to this Board member that the method of  
9 publishing the burn season regulations is not adequate. When the only  
10 public notice of the burn seasons is by voluntary publication and  
11 broadcast by the media, then confusion is created among residents of  
12 the county.

13 It is the duty of governmental regulatory agencies to make its  
14 rules clear and understandable to the public. When agencies fail in  
15 this duty, citizens should not be punished for failure to comply.  
16 Richard Peters v. SCAPCA, PCHB No. 354 (1973).

17 It may be that it is a citizen's responsibility to keep abreast of  
18 all the multitude of laws and regulations which govern his life as the  
19 majority states; but surely it is also the responsibility of a  
20 regulatory governmental agency to make its rules clear and  
21 understandable to its citizens.

22 I believe the SWAPCA should be required to adopt the burn seasons  
23 as part of their Regulation I and publish same; and (2) require the  
24 inspectors to carry copies of this part of Regulation I with them for  
25 easy distribution to the citizens; and (3) introduce this handbill in

26 DISSENTING OPINION  
27 PCHB No. 85-16

1 all future proceedings before this Board.

2 The burn seasons have never been introduced in any of these  
3 proceedings as evidence. In other words, the Board as long as I have  
4 been a member, has never seen a piece of paper that states the dates  
5 of the burn seasons.

6 As the majority states the public interest would be better served  
7 if efforts to inform citizens of restrictions were more than  
8 perfunctory in matters so basic to the management of households as  
9 open burning.

10 Finally I would dismiss this particular penalty in this appeal on  
11 grounds that the Notice of Violation alleged "violation of Section  
12 400-040 (Emissions) of Regulation I as opposed to Section 400-035  
13 (Open Fires) of Regulation I. I would argue that such language is in  
14 fact wrong, and thus does not inform appellant as to which regulation  
15 is at issue and so does not describe the violation with "reasonable  
16 particularity."

17 For these reasons I would vacate the notice of violation and  
18 strike the \$25 fine.

19 POLLUTION CONTROL HEARINGS BOARD

20  5/3/81  
21 LAWRENCE J. FAULK, Chairman  
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26 DISSENTING OPINION  
27 PCHB No. 85-16